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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

EDWARD LEE, EDWARD ARSENAULT, EMIL DE BACCO, RICHARD HINTON, ARNOLD KREEK, and MARGARET MACHT,

Plaintiffs,

v.

WELLS FARGO & COMPANY, WELLS FARGO FUNDS MANAGEMENT, LLC, WELLS FARGO FUNDS TRUST,

Defendants.

No. CV-08-1830 RS

PLAINTIFFS' MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL PURSUANT TO U.S.C. § 1292(B) AND FOR A STAY OF PROCEEDINGS

[Proposed] Order Filed Concurrently]

Hearing Date: March 3, 2011
Time: 1:30 p.m.
Courtroom: 3, 17th Floor

Honorable Richard Seeborg

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs hereby move the Court pursuant to 28 U.S.C. § 1292(b) for an Order amending the Court's January 14, 2011 Order Denying Motion for Reconsideration to certify it for interlocutory appeal to the Ninth Circuit Court of Appeals, and for a stay of proceedings pending the determination of Plaintiffs' application for an appeal. The motion is based on this notice of motion, the following memorandum of points and authorities, the pleadings, records and files in this action, and any argument that may be presented at the hearing on this motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Should this Court certify for interlocutory appeal its January 14, 2011 Order Denying Motion for Reconsideration of the Court's August 19, 2009 Order Dismissing Class Allegations Only?

2. Should this Court stay proceedings in this action pending the Ninth Circuit's determination of Plaintiffs' application for an appeal?

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs seek certification for interlocutory appeal under 28 U.S.C. § 1292(b) of this Court's January 14, 2011 Order Denying Motion for Reconsideration (Dkt. # 126). The Order Denying Motion for Reconsideration presents precisely the type of situation in which 1292(b) certification is warranted and the statutory requirements are met here. As detailed below, in light of the recent United States Supreme Court decision in *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) which set forth the standard for the type of notice required to commence the running of the statute of limitations for a claim brought under section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), the Ninth Circuit vacated and remanded the precedents relied upon by the Court in its August 19, 2009 Order dismissing the class allegations only. The Court's Order Denying Motion for Reconsideration involves a controlling question of law since the district court's resolution of the notice standard, which resulted in dismissal of the class claims, was based on

decisions which have now been vacated and remanded for further proceedings in light of *Merck*. There is substantial ground for difference of opinion as to whether these decisions are consistent with *Merck*. Indeed, in light of the fact that this Court held that the standard used by this Court in its Order Dismissing Class Allegations Only, is substantively identical to that approved in *Merck*, even though the Ninth Circuit vacated and remanded those decisions in light of *Merck*, leaves no doubt that there is substantial ground for difference of opinion. Finally, because final determination by an appellate court on the contested statute of limitations issue is necessary to determine the status of the claims of unnamed class members, interlocutory appeal will materially advance the ultimate termination of the litigation. Therefore, interlocutory appeal and a stay of proceedings pending the Ninth Circuit's determination of the appeal is the most efficient way to proceed.

II. PROCEDURAL HISTORY

This action was filed on April 4, 2008. Following the appointment of Lead Plaintiff and Lead Counsel, an amended complaint was filed asserting claims for violation of Section 10(b) of the Exchange Act against Wells Fargo Funds Management and Wells Fargo Funds Trust, and a claim for control person liability against Wells Fargo & Co. On January 23, 2009, Defendants moved to dismiss including on the grounds that Plaintiffs' claims were time barred because the statute of limitations had begun to run no later than December 2005.

On August 19, 2009, the Court issued its Order Dismissing Class Allegations Only finding that Plaintiffs' class allegations with respect to their Exchange Act claims filed on April 4, 2008 were barred by the statute of limitations under 28 U.S.C. § 1658(b).[1] The Court articulated the following standard to be applied to determine when the statute of limitations began running: "*First*, a court must determine whether the plaintiff had inquiry notice of the facts giving rise to his claim . . . . *Second*, a court must ask whether 'the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.'" Dkt. # 86 at 5 (italics in original), citing *Betz v. Trainer Wortham & Co., Inc.*, 519 F.3d 863 (9th Cir. 2008).

[1] 28 U.S.C. § 1658(b)(1) provides that claims for violation of Section 10(b) and Section 20(a) of the Exchange Act must be brought within two years "after the discovery of the facts constituting the violation."

The Court then relied upon the standard and reasoning of *In re American Funds Sec. Litig.*, 556 F. Supp. 2d 1100 (C.D. Cal 2008), which the Court found to be "directly on point" (Dkt. # 86 at 5-10) with "nearly identical" facts (*id.* at 11). The Court concluded based upon the *Betz* and *American Funds* precedents that Plaintiffs in this case were on "inquiry notice" of their claims no later than December 2005 based on certain documents including the June 2005 NASD press releases, news articles concerning it, the December 2005 Disclosure Statement, and the initial complaint filed in the *Siemers* action. *See Id.* at 11-15. The Court held that "absent tolling, the two-year statute of limitations ran on these claims before this action was commenced" on April 4, 2008 *Id.* at 8. The Court concluded that the statute of limitations for Plaintiffs' Exchange Act claims was tolled with respect to the individual plaintiffs but not for the class allegations and, therefore, dismissed Plaintiffs' class allegations as untimely. *Id.* at 16-21.

On October 20, 2010, Plaintiffs sought leave to file a motion for reconsideration of the Court's August 19, 2009 Order based on the recent decision issued by the United States Supreme Court in *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010) and the United States Court of Appeals for the Ninth Circuit in *Betz v. Trainer Wortham & Co. Inc.*, 610 F.3d 1169 (9th Cir. July 7, 2010) and *In re American Funds Sec. Litig.*, No. 08-56034, 2010 U.S. App. LEXIS 19403 (9th Cir. Sept. 17, 2010). The Court granted Plaintiffs' motion on November 29, 2010 and Plaintiffs filed their motion for reconsideration on December 16, 2010. Defendants filed an opposition brief on December 30, 2011 and Plaintiffs filed their reply brief on January 6, 2011. On January 14, 2011, the Court issued an Order Denying Motion for Reconsideration.

III. ARGUMENT

A. Standard of Interlocutory Appeal

Pursuant to 28 U.S.C. 1292(b), the Court has discretion to certify an interlocutory order for appeal when (1) the "order involves a controlling question of law"; (2) "as to which there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. U.S. Dist. Ct.*, 459 U.S. 1191 (1983). "Immediate appeal should be granted where there is 'a highly debatable question

that is easily separated from the rest of the case, that offers an opportunity to terminate the litigation completely, and that may spare the parties the burden of a trial that is expensive for them even if not for the judicial system.'" *Helman v. Alcoa Global Fasteners, Inc.*, No. CV-09-1353 SVW, 2009 U.S. Dist. LEXIS 64720, at *18 (C.D. Cal. June 16, 2009) (quoting Wright, Miller & Cooper, Federal Practice & Procedure § 3930 (2d ed. 1996)). That is the case here, and certification for appeal is therefore appropriate.

B. The Court's Order Denying Motion for Reconsideration Involves a "Controlling Question of Law"

A question is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. Here, consideration at the district court level of whether the two-year statute of limitations had run on Plaintiffs' class claims with respect to their claims under Section 10(b) and Section 20(a) of the Exchange Act, resulted in dismissal of such claims based on decisions which have now been vacated and remanded for further proceedings based on the Supreme Court of the United States decision in *Merck*. *See Betz*, 610 F.3d at 1171; *American Funds,* 2010 U.S. App. LEXIS, at *3. The Ninth Circuit, in vacating and remanding *Betz* and *American Funds*, made it clear that these cases' analyses regarding the timeliness of claims under 28 U.S.C. § 1658(b) must be reassessed in light of *Merck*. The issue to be decided on appeal is whether the precedents relied on by the Court regarding the timeliness of Plaintiffs' claims are consistent with the inquiry notice standard set forth in *Merck*. This question of law is controlling because consideration of it on appeal would materially affect the outcome of litigation in the district court.

C. There is "Substantial Ground for Difference of Opinion"

The "central inquiry" of the second certification requirement is "the strength of the arguments in opposition to the challenged ruling." *Helman,* 2009 U.S. Dist. LEXIS 64720, at *17 (quotations marks omitted). Here, there is a substantial ground of difference of opinion as to whether *Betz* and *American Funds*, relied on by the Court in its August 19, 2009 Order Dismissing Class Allegations Only, are consistent with the Supreme Court's decision in *Merck,* as indicated by this Court in it's January 14, 2010 Order denying plaintiffs' motion for reconsideration.

Following the Supreme Court's decision in *Merck*, the Ninth Circuit in *Betz* and *American Funds* vacated and remanded the decisions for further proceedings consistent with *Merck*. *See Betz*, 610 F.3d at 1171; *American Funds*, 2010 U.S. App. LEXIS 19403, at *3. There can be no doubt that the Ninth Circuit made this decision in light of the fact that the standards applied in *Betz* and *American Funds* need further consideration in light of the standard outlined in *Merck*. *Merck* requires that the statue of limitations on a claim for violation of Section 10(b) begins to run once the plaintiff discovers, or a reasonably diligent plaintiff would have discovered, ***the facts constituting the violation, including scienter.*** 130 S. Ct. at 1798. (emphasis added). However, the August 19, 2009 Order, relying on *Betz* and *American Funds*, applied a legal standard under which facts indicating the existence of an omission alone, without scienter, could trigger the running of the Statute of Limitations for a securities ***fraud*** case. *See* August 19, 2009 Order at 10-11. While this might have been true prior to the Supreme Court's decision in *Merck*, it certainly is not the case after *Merck,* as the Supreme Court specifically held that proof of a false statement or material omission is not enough to meet the pleading requirement for scienter. *Id.* at 1796. ("Merck argues that, even if 'discovery' requires facts related to scienter, facts that tend to show a materially false or misleading statement (or material omission) are ordinarily sufficient to show scienter as well…But we do not see how that is so.").

In the Order Denying Motion for Reconsideration, the Court stated that it applied an inquiry notice standard that is identical to the standard outlined in *Merck*. *See* January 14, 2011 Order at 4. But the two cases that this Court relied on, in making its decision on inquiry notice, have been vacated and remanded, ***in light of Merck***. Indeed, California district courts have held that there is a "substantial ground for difference of opinion" when there is lack of applicable case law on the controlling issue. *See, e.g., Wells Fargo Bank v. Bourns, Inc*., 860 F. Supp. 709, 717 (N.D. Cal. 1994) (interlocutory appeal under 1292(b) allowed where issues "have not been squarely addressed by the Ninth Circuit."). Therefore, there is a substantial ground for difference of opinion as to whether this Court, when dismissing Plaintiffs' class allegations, utilized a legal standard consistent with *Merck*.

Moreover, if one of the goals of the interlocutory appeal process is to obtain uniformity and

judicial economy in the application of the law, and the fact that *Betz* and *American Funds* are now being reconsidered, to *not* reconsider this case in light of *Merck*, would cause inconsistency and unfairness. *See Grant v. Chevron Phillips Chem. Co. L.P.*, 309 F.3d 864, 875 (5th Cir. 2002) (noting that the district court stated "[t]here needs to be uniformity on this issue" when certifying the issue for interlocutory appeal); *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1025 (C.D. Cal. 2000) ("certification [of interlocutory appeal] will not only effectuate judicial economy, but also uniformity in the application of the law.").

D. Interlocutory Appeal May "Materially Advance the Ultimate Termination of the Litigation"

Under the third prong of Section 1292(b), an interlocutory appeal is proper if it "may materially advance the ultimate termination of the litigation." 28 U.S.C. 1292(b). "This factor is linked to whether an issue of law is 'controlling' in that the Court should consider the effect of a reversal by the court of appeals on the management of the case." *A.H.D.C. v. City of Fresno, California*, No. 97-5498, 2003 U.S. Dist. LEXIS 27955, at *11 (C.D. Cal. Feb. 26, 2003).

First, the unsettled nature regarding the question of the Court's statute of limitations ruling is the reason that this case has proceeded at the pace it has. In setting the case schedule for this matter, the Court issued a lengthy schedule with a distant trial date so that the Court could take into account the Ninth Circuit's decision on the appeal of the district court's ruling in *American Funds*. *See* October 16, 2009 Order Setting Schedule (Dkt. # 94). Further extension of the schedule has resulted while the parties waited for the Supreme Court's decision in *Merck*. *See* May 7, 2010 Stipulation and Order re Scheduling (Dkt. # 106) (order extending schedule in light of uncertainty regarding law on statute of limitations, with the parties stipulating that they "agree that given that they have engaged in limited discovery to date and given the continued potential for uncertainty regarding the impact, if any, of *In re American Funds*, a modification of the present discovery and trial schedule is warranted"). *Id.* at 2. Further delay could be caused once the district courts in *Betz* or *American Funds* issue their ruling on the statute of limitations issue that the Ninth Circuit ordered them to consider in light of *Merck*. Additionally, the Ninth Circuit could issue rulings on statute of limitations in light of *Merck* in other cases, which then the parties would request this Court to take

into consideration. However, this further delay could be avoided by having the Ninth Circuit make a definitive decision now on the statute of limitations issue posed in the above-captioned matter.

Second, it needs to be noted that the above captioned matter is a class action. The ruling contested here is, in essence, the equivalent of the denial of a motion for class certification. It affects the rights of unnamed class members. Final determination by an appellate court on the contested statute of limitations issue is necessary to determine the status of the claims of unnamed class members. Until that occurs, there can be no "ultimate termination" to the litigation.

The case of *Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463 (3d Cir. 1994) is on point. In *Sperling*, the district court rendered a decision regarding the statute of limitations that impacted members of a class action. *Id.* at 465. The district court certified the statute of limitations question for interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b), and the appellate court subsequently granted permission to appeal. *Id.*

The case of *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001) is also instructive here. In *Newton*, the appellate court granted interlocutory review on an order denying class certification. The appellate court reasoned that:

> If granting the appeal…would permit us to address (1) the possible case-ending effect of an imprudent class certification decision (the decision is likely dispositive of the litigation); (2) an erroneous ruling; or (3) facilitate development of the law on class certification, then granting the motion would be appropriate.
>
> * * *
>
> The claims here touch on several reasons justifying interlocutory appeal. On the one hand, some of the securities claims pressed by the putative class members may be too small to survive as individual claims. On the other, certifying the class may place unwarranted or hydraulic pressure to settle on defendants. Either way, an adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation. Moreover, this case raises fundamental questions about what

> type of private securities claims merit class certification. For these reasons, the motion was properly granted.

Id. at 165.

Following the logic of *Sperling* and *Newton*, this Court should also certify the issue regarding the statute of limitations for interlocutory appeal.

E. The Court Should Stay Proceedings Pending Appeal

If the Court decides to certify the Order for interlocutory appeal, it should stay the proceedings of this action pending appeal, or at least until the Ninth Circuit determines whether to permit the appeal. Section 1292(b) states: [A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of appeals or a judge thereof shall so order." 28 U.S.C. 1292(b). Therefore, "by statute, this court has authority to stay the proceedings pending an interlocutory appeal." *Eaton v. Siemens*, No. 2:07-cv-315 FCD KJM, 2007 U.S. Dist. LEXIS 58583, at *5 (E.D. Cal. Aug. 10, 2007). Additionally, a district court has inherent discretion to control its docket "in a manner which will promote economy of time and effort for itself, for counsel and for litigants." *Filtrol Corp. v. Kelleher*, 467 F.2d 242, 244 (9th Cir. 1972); *see also Mediterranean Enters., Inc. v. Ssangyong Corp*., 708 F.2d 1458, 1465 (9th Cir. 1983) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.").

A stay is appropriate here as it would prevent the parties from engaging in wasteful discovery and would promote judicial efficiency. *See Eaton*, 2007 U.S. Dist. LEXIS 58583, at *12 (granting stay of proceedings upon certification for appeal because it "promotes economy of time and effort both for the court and the parties."); *Helman*, 2009 U.S. Dist. LEXIS 64720, at *19 (granting certification for appeal and stay of proceedings where "it would be preferable for the Court of Appeals to address the issue now, rather than to require the parties [] to expend significant time and resources, which might ultimately be wasted.").

IV. CONCLUSION

For the foregoing reasons, the Court should certify the question presented herein to the Ninth

Circuit Court of Appeals pursuant to 28 U.S. C. § 1292(b) and stay proceedings in this Court pending appeal.

Respectfully submitted,

DATED: January 24, 2011

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Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Deborah Clark-Weintraub, hereby declare that on January 24, 2011, I served all counsel of record with the foregoing document by filing said document with the Court's electronic filing system, which then provided service of the document to all counsel of record.

/s/ Deborah Clark-Weintraub
Deborah Clark-Weintraub